No. 16,491

IN THE

United States Court of Appeals

For the Ninth Circuit

S. B. HUFFMAN, Trustee of the Estate of Newcomb Interests, Inc., a corporation, doing business as Casa Del Rey Hotel, Bankrupt,

Appellant,

vs.

HARRY A. FARROS,

Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

Appellant sets forth in his Opening Brief the "Stipulation As to Facts" entered into by the parties through their respective counsel (AOB 3), without the preamble thereto, which reads: "It is Hereby Stipulated . . . that the *following facts shall be considered* by the Court on the hearing of the Petition for Review." (TR 15.) Thus, the Stipulation covers *all* the facts to be considered by the Reviewing Court; it dis-

(NOTE): All emphasis will be appellee's unless otherwise noted. References to Appellant's Opening Brief will be, e.g. (AOB 10).

penses with the discussion of any other matters of evidence, and *excludes* from consideration any other alleged "facts"; except those stipulated to, except documentary facts which may appear from the record. 46 CalJur2d 14, Sec. 7; 46 CalJur2d 34, Sec. 15. The Stipulation As to Facts was practically the same as a "Settled Statement" of the evidence. 4 CalJur2d 118, Sec. 353.

Documentary facts, showing the basic proceedings, necessary to complete a statement of the case, are: Upon the Petition of the Trustee in Bankruptcy for an Order to sell the liquor license free and clear of any lien, claim, right or interest therein, of Harry Farros, appellee (TR 32), the Referee issued an Order directed to Harry Farros to show cause why the Order asked by the Trustee should not be granted (TR 34). Farros appeared and filed his Answer and Claim of Interest, claiming ownership of said liquor license, and that he was entitled to the transfer thereof to him, or to his nominee (TR 8), upon which a hearing was held. The Referee then entered his Order Granting the Petition of the Trustee to Sell Free and Clear of any lien, claim, right or interest in said liquor license of Harry Farros. (TR 6.) Thereupon Farros through his then counsel, filed his Petition for Review of said Order. (TR 3.) Thereupon, the Trustee, and Appellee, through their attorneys entered into a Stipulation (TR 13), which, after reciting the foregoing proceedings, provided: that the Trustee "may forthwith proceed to sell" the liquor license "*covering the premises* formerly occupied by said bankrupt", subject to the

approval of the Department of Alcoholic Beverage Control, at public sale, and that the "proceeds of said Trustee's sale of said liquor license shall be impounded by said Trustee, and any and all claims of lien or interest or title which said Respondent (Harry Farros) may have had in or to or upon said liquor license, shall, for all purposes, be deemed transferred to the said *proceeds* of the said Trustee's sale of said liquor license, without prejudice to any of the rights of said Respondent (Farros) in said liquor license, and without prejudice to the rights of the Trustee to contest the validity of said claims of said Respondent (Farros) therein." (TR 14.)

Upon this Stipulation it was "so ordered" by the Referee. (TR 15.)

It appears from the Referee's Certificate on Petition for Review of Referee's Order, under "Preliminary Proceedings" (TR 20), that, following the foregoing Stipulation to the Sale of the license, same was sold at public sale by the Trustee, for $6,000.00. Thus this is the monetary subject of this controversy.

THE THEORY OF THE HEARING BEFORE THE REFEREE AND THE BASIS OF HIS DECISION.

This was epitomized in the following quotation from the Referee's Certificate On Petition for Review, under "Discussion" (TR 26), wherein, after quoting Section 7.3 of the *Alcoholic Beverage Control Act* (Now Sec. 24076 of the Business and Professions Code

of California, hereinafter referred to as "B & P Code"), effective *October 1, 1949,* then forbidding such retransfer agreements as the instant one (made on July 25, 1946), the Referee says:

> "There is no question that Section 7.3 of the Alcoholic Beverage Control Act (Sec. 24076, B & P Code) hereinabove quoted was *aimed at* the lease agreement of August 1, 1946. (Exhibit No. 1.) * * *"
>
> (In other words, that section 7.3—Sec. 24076, B & P Code—was retroactive, and invalidated the retransfer agreement contained in the lease.)

STATEMENT OF QUESTION INVOLVED.

Where the owner and operator of a hotel and bar therein, and a liquor license covering said bar, leases said hotel with bar, in July 1946, over three years prior to the effective date of Sec. 7.3 of the Alcoholic Beverage Control Act of California, which was October 1, 1949, which, as to agreements entered into *after* that date, would prohibit such retransfer agreements and invalidate them; and there is a covenant in said recorded lease providing, that said lessor has transferred to said lessee said liquor license (which transfer *to* lessee was without consideration), and that the lessee agrees that at the expiration of the term of said lease, it will retransfer to lessor said liquor license, without any consideration whatsoever on the part of lessor; and the lessee executes a chattel mortgage on the contents of the hotel with bar, coincident

with the lease, as security for payment of the rentals required thereunder; and the lessee defaults in such payments, and the lessor forecloses said chattel mortgage, and terminates and cancels said lease, and retakes possession of said hotel and bar; and some nine months thereafter, in June 1955, the lessee is adjudicated an involuntary bankrupt; can the trustee of lessee's estate in bankruptcy, legally, take possession of said liquor license as a purported asset of lessee's estate in bankruptcy, and sell same, free and clear of the claim of said lessor, to the ownership and possession of said liquor license, duly asserted in said bankruptcy proceedings; on the basis of the foregoing facts?

ARGUMENT.

I. THE TRANSFER OF THE LICENSE TO LESSEE ON JULY 25, 1946, TO USE IN CONNECTION WITH THE HOTEL AND BAR THEN LEASED, AND THE PROVISION IN THE LEASE FOR RETRANSFER OF THE LICENSE TO LESSORS, UPON TERMINATION OF THE LEASE, WAS NOT AFFECTED BY THE PASSAGE OF SEC. 7.3 OF THE ALCOHOLIC BEVERAGE CONTROL ACT, EFFECTIVE OCTOBER 1, 1949, ASSUMING SUCH LEGISLATION PROHIBITED SUCH RETRANSFER AGREEMENTS. SUCH LEGISLATION WAS NOT RETROACTIVE. THE RETRANSFER AGREEMENT WAS VALID AND ENFORCEABLE.

Citrigno v. Williams, (May 1958) 255 F2d 675, 678, 679 (CCA 9th); *Cavalli v. Macaire,* (Apr. 1958) 159 CA2d 714, 324 P2d 336; *Tognoli v. Taroli,* (Sep. 1954) 127 CA2d 426, 273 P2d 914; *Pehau v. Stewart,* (Jun. 1952) 112 CA2d 90, 245 P2d 692; *Etchart v. Pyles,* (Sep. 1951) 106 CA2d 549, 553, 554, 235 P2d 427,

430; *Campbell v. Bauer,* (Jun. 14, 1951) 104 CA2d 740, 232 P2d 590; *Saso v. Furtado,* (Jun. 14, 1951) 104 CA2d 759, 769, 232 P2d 583, 589.

The basic holding of all these cases is in accord with the above heading. However, in *Citrigno v. Williams,* supra, decided by this court; while this rule is recognized therein as being the established rule of the decisions of the California courts, (255 F2d 679), it is held that the parties in *Citrigno v. Williams,* made so many changes and additions and amendments, in and to the *original* lease made *before* the effective date of *Sec. 7.3,* that the *final* lease agreement consummated *after* the effective date of said section, was actually a *new lease,* and being made after such effective date of the section prohibiting such retransfer agreements, it was subject to the inhibition of said section, and for this reason was invalid and unenforceable.

It is pointed out in *Cavalli v. Macaire,* supra, (159 CA2d 718):

> "This section (7.3) is not only not retroactive as to rights that have accrued and have been adjudicated before the effective date of the section, but is also not retroactive as to rights that have accrued but have not yet been adjudicated. (Tognoli v. Taroli, 127 CA2d 426, 273 P2d 914.) . . ."
>
> (And in quoting with approval from the opinion of the trial judge) (p. 720):
>
> ". . . it is also beyond dispute that, at the time of the execution of each of the three documents above referred to (the leases, with agreement to retransfer the liquor license) it was the intention of all parties that defendants would merely have

> the right to use said licenses until the premises were restored . . . Defendants have shown no equities, and, in our opinion, it would be unjust enrichment to hold that they were entitled to retain the licenses."

In *Campbell v. Bauer,* supra, (104 CA2d 744) the court holds that:

> ". . . to permit defendants to retain the advantage of their own wrong (refusal to retransfer the liquor license as agreed) would be unconscionable."

In each of these cases (excepting *Citrigno v. Williams,* supra, for the reasons noted), it was held that the retransfer agreement was valid and enforceable.

In *Cavalli v. Macaire,* supra (159 CA2d 717), the court rendered judgment for lessor, that the defendants, lessees, were bound by the retransfer agreement and enjoined them from transferring the licenses to anyone but plaintiffs, and retained jurisdiction to make further orders to enforce the agreement of retransfer.

In *Tognoli v. Taroli,* supra (127 CA2d 427), the lessee having sold the license to another in violation of the retransfer agreement, without the knowledge of lessor, the court ordered judgment for its value, $7,350.00.

In *Pehau v. Stewart,* supra (112 CA2d 97), the Judgment ordered appellants, lessees, to retransfer the liquor license to lessor in accordance with the terms of the lease. A *limited* new trial had been

granted but such order did not affect the Judgment as to the retransfer of the license.

In *Etchart v. Pyles,* supra (106 CA2d 553), the court entered a decree, ordering the defendant lessee to specifically perform the agreement in the lease for retransfer of the license to lessor.

In *Campbell v. Bauer,* supra (104 CA2d 742), while the transfer to defendants and their agreement to retransfer the license to plaintiffs, was made in connection with a loan to defendants and not a lease, the defendants refused to retransfer the license, upon default, and demand, as agreed in the contract. The court entered judgment that defendants *had no interest in the license;* restrained defendants from transferring the license to others than plaintiffs, and ordered defendants to execute such applications and instruments as might be necessary to effectively transfer the license to plaintiffs; and appointed a commissioner to execute the same in the event defendants refused to do so.

In *Saso v. Furtado,* supra (104 CA2d 761), there was the usual transfer by the lessor of the license to the lessee coincident with the making of the lease; and the usual agreement in the lease that lessee would retransfer the license to the lessor at the expiration of the lease, without consideration. When the lease expired the defendants refused to surrender the premises or to retransfer the license to plaintiff. The judgment in lessor's action was that defendant lessee execute an application for the transfer of the license

to plaintiff lessor, and she was enjoined from attempting to transfer same to anyone but plaintiff; and a commissioner was appointed to execute the application in the event defendant failed to do so.

II. A LIQUOR LICENSE IS A "PRIVILEGE", A "PERMIT". IT IS NOT A "PROPRIETARY RIGHT". IT IS INTANGIBLE PERSONAL PROPERTY NOT CAPABLE OF MANUAL DELIVERY, AND HENCE MAY NOT BE THE SUBJECT OF A CHATTEL MORTGAGE. IT IS A VALUABLE PROPERTY RIGHT, OWNED PRIVATELY AS PROPERTY IS OWNED. IT MAY BE TRANSFERRED AND IT MAY BE SOLD, SUBJECT TO THE APPROVAL OF THE STATE BOARD OF EQUALIZATION. IT IS NOT TAXABLE AS "PERSONAL PROPERTY" BY THE STATE, BUT IT IS SUBJECT TO U. S. INTERNAL REVENUE TAX.

Saso v. Furtado, supra (June 1951), 104 CA2d 759, 763, 232 P2d 583; *In Re Quaker Room* (May 1950), 90 F. Supp. 758, 761; *Golden v. State of California,* (June 1955), 133 CA2d 640, 643, 285 P2d 49; *Etchart v. Pyles,* supra (Sept. 1951), 106 CA2d 549, 551, 235 P2d 427; *Roehm v. County of Orange* (1948), 32 C2d 280, 290, 187 P2d 49.

In Re Quaker Room, supra, cited by appellant, (AOB 6, 11) holds (90 F. Supp. 761), that a liquor license, "constitutes 'property' as that term is used in the Bankruptcy Act." (Page 761.) But it does not hold that title thereto "passes to the Trustee in Bankruptcy", as claimed by appellant (AOB 6), nor that title should, or did, so pass in that particular case.

Golden v. State of California, supra (1955), 133 CA2d 643, cited by appellant (AOB 11), holds that for federal taxing purposes, "property" was used in a broad, not narrow, sense; and that a liquor license was subject to a lien for U. S. Internal Revenue Taxes. Otherwise the case is not in point.

Roehm v. County of Orange, supra (1948), 32 C2d 280, 290, cited by appellant (AOB 5), establishes and/or confirms, that a liquor license is intangible personal property, and as such is not subject to taxation by the State of California, as personal property, although certain intangibles specified by the court are taxable as personal property. That case involved solely such a taxing problem, has no other application to this case, and does not hold that a liquor license "is property, title to which passes to the Trustee in Bankruptcy" (AOB 5), as claimed by appellant, nor does it mention "bankruptcy."

III. UPON THE TERMINATION OF THE LEASE OF NEWCOMB INTERESTS, INC. (TR 17-IV) IT WAS OBLIGATED TO RETRANSFER THE LICENSE TO APPELLEE AS AGREED IN THE LEASE; ITS FAILURE TO DO SO WAS WRONGFUL; AND IT THEREUPON BECAME AN INVOLUNTARY TRUSTEE THEREOF FOR APPELLEE, THE OWNER OF THE LICENSE; AND HELD THE LICENSE IN ITS NAME AT THE TIME OF THE FILING OF THE PETITION FOR ADJUDICATION OF BANKRUPTCY AGAINST IT, AS SUCH TRUSTEE FOR APPELLEE.

Sec. 2223 *Civil Code* provides:

> "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."

Sec. 2224 *Civil Code* provides:

> "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other or better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

A liquor license authorizes the person to whom issued to exercise the rights and privileges specified therein *"at the premises for which issued* during the year for which issued." Sec. 23355 *Business and Professions Code.* The whole transaction herein establishes that it was the intention of the parties to said lease that lessee would merely have the right to use said license until the premises were restored. *Cavalli v. Macaire,* supra, 159 CA2d 718. "While a liquor license must be renewed yearly and the license issued is a separate document from that issued the year before, it is considered the same license." *Saso v. Furtado,* supra, 104 CA2d 762.

In *Church v. Bailey* (1949), 90 CA2d 501, 503, 203 P2d 547, cited in the decision of the U. S. District Judge writing the opinion herein, 171 F. Supp. 704, it is held, that an employee who misappropriated funds of his employer was chargeable as an involuntary trustee thereof for the benefit of the owner, under the aforesaid sections, and that a trust would be impressed upon property acquired with such funds unless the same is held by a bona fide purchaser for value without notice in good faith. Citing also Sec. 2243 *Civil Code.*

In *Hansen v. Bear Film Company, Inc.* (1946), 28 C2d 154, 169, 168 P2d 946, where trustor under an express trust, transferred the bare legal title of corporate stock to his mother as trustee to be transferred back to trustor at his request, and the latter did not demand a retransfer during his lifetime; it was held that upon trustor's death it was trustee's duty to immediately convey title to the stock into trustor's name or that of the representative of his estate, since upon trustor's death the express trust failed and the trustee then held the stock upon a resulting trust for trustor's estate.

It is said in *Fleishman v. Blechman* (1957), 148 CA2d 88, 93, 306 P2d 548, that a constructive or resulting trust, is a remedial device created to prevent unjust enrichment.

In *Niles v. Rapoport & Sons* (1942), 53 CA2d 644, 128 P2d 50 (also cited in the decision of the U. S. District Court herein, 171 F. Supp. 704), wherein the holders of a note of a third person agreed orally that they would hold the note for themselves and an attorney and collect the payments thereon and pay to said attorney one-half thereof, and then repudiated any interest of said attorney in the note or its proceeds and refused to comply with their agreement, it was held that the facts established against the holders of the note an involuntary or constructive trust, and that they must be held to hold the note and the attorney's interest therein as involuntary or constructive trustees for said attorney (suing through his assignee).

In *Monica v. Pelicas* (1955), 131 CA2d 700, 704, 281 P2d 357, wherein plaintiff's money was taken by defendant Arminda out of their joint account, and used for a purchase of real property in her name and that of Manuel, whereas plaintiff had authorized her only to buy property at the request of, and for Manuel, and put it in his name, it was held that under Sec. 2224 Civil Code, Manuel and Arminda became involuntary trustees of said property for the benefit of plaintiff who would otherwise have had it, and the court imposed such involuntary trust on the property itself. The court therein quotes the following from *Bainbridge v. Stoner,* 16 C2d 423, 428, 429:

> "The theory of a constructive trust was adopted by equity as a remedy to compel one to restore property to which he is not justly entitled, to another . . . But the one whose property has been taken from him is not relegated to a personal claim against the wrongdoer which might have to be shared with other creditors; he is given a right to the restoration of the property itself. The title holder, is, therefore said to be a constructive trustee holding title to the property for the benefit of the rightful owner . . ."

To the same effect as the foregoing cases, is *Robertson v. Summeril,* (1940), 39 CA2d 62, 65.

A constructive trust is always an involuntary trust. 48 *CalJur*2d 657; *Norton v. Bassett,* 154 C 411, 97 P 894.

In the *Restatement,* on *Restitution,* p. 640, Sec. 160, it is set forth:

"Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises."

IV. "EVERY ONE TO WHOM PROPERTY IS TRANSFERRED IN VIOLATION OF A TRUST, HOLDS THE SAME AS AN INVOLUNTARY TRUSTEE UNDER SUCH TRUST, UNLESS HE PURCHASED IT IN GOOD FAITH, AND FOR A VALUABLE CONSIDERATION."

Sec. 2243 *Civil Code.* This section makes available against a transferee, other than an innocent purchaser for value, the option of having the property with its fruits replaced or of recovering the proceeds with interest. 49 *CalJur*2d 320, Sec. 467. (Auth.)

One who takes title from a trustee with notice of his relation, or knowledge of the facts, stands in his shoes, and takes title charged with all the rights, liabilities and duties that rested on his grantor at the time of the transfer. The trust is enforceable against him in the same manner and with like effect as against the original trustee. 49 *CalJur*2d 321, Sec. 468. (Auths.)

V. THE CLASSES OF PROPERTY WHICH PASS TO THE TRUSTEE IN BANKRUPTCY ARE GOVERNED PRIMARILY BY THE FEDERAL BANKRUPTCY ACT, BUT IN DETERMINING WHETHER PROPERTY OF THE BANKRUPT MIGHT HAVE BEEN TRANSFERRED BY HIM OR LEVIED UPON AND SOLD UNDER JUDICIAL PROCESS AGAINST HIM, THE LAWS OF THE STATE IN WHICH THE PROPERTY IS LOCATED, GOVERN.

8 *C.J.S.* 621, Sec. 169 on "Bankruptcy" (Auths.); *In re Waite-Robbins Motor Co.* (D.C.Mass.1911), 192 F. 47.

VI. THE BANKRUPT LESSEE COULD NOT CLAIM ANY RIGHT, TITLE OR INTEREST IN OR TO THE LICENSE, AND HELD SAME AS AN INVOLUNTARY TRUSTEE FOR APPELLEE. THE TRUSTEE OF ITS ESTATE IN BANKRUPTCY, THE APPELLANT HEREIN, IS IN NO STRONGER POSITION THAN THE BANKRUPT ITSELF WOULD HAVE BEEN TO RESIST AN APPLICATION TO RECLAIM PROPERTY HELD IN TRUST FOR THE RECLAIMANT, AND CANNOT SUCCESSFULLY DO SO.

TITLE ACQUIRED BY TRUSTEE.

"The trustee in bankruptcy does not acquire title to property the legal title to which is in the bankrupt as trustee, 74 (Many authorities cited) the trustee in bankruptcy is not entitled to property in the possession of the bankrupt which is held under an implied trust, or to which a constructive trust attaches, 76 (Many authorities)."

8 *C.J.S.* 653, Sec. 193 on Bankruptcy.

"The trustee in bankruptcy succeeds to the bankrupt's title and to all the rights and remedies pertaining thereto which the bankrupt could have exercised but for his bankruptcy. . . . Except

in so far as the trustee is subrogated to the rights of creditors which exceed as to the particular property the rights of the bankrupt, the trustee has no superior rights or greater interest in the property and occupies no better position with respect thereto than the bankrupt, 43 (Many cases cited) and he takes the property not as an innocent purchaser for value, without notice, but as the debtor had it at the time of bankruptcy, subject to all valid claims, liens and equities. 44. (Many auths.)"

8 *C.J.S.* 664, Sec. 199.

A resulting trust which might be established against the bankrupt may ordinarily be established against the trustee in bankruptcy. *In re Meyerfeld* (D.C.Cal.), 46 F2d 665, Affd. C.C.A. *Williams v. Levy,* 54 F2d 18.

"The Bankruptcy Act can give the trustee no greater rights than he would have under state law."

8 *C.J.S.* 668, Sec. 199.

"Where the bankrupt holds property in trust for the benefit of another, equitable title is in such other notwithstanding legal title is in the trustee, and it is very doubtful whether any title whatsoever vests in the bankruptcy trustee as the bankruptcy court is a court of equity dealing primarily in the equities of the situation, . . . such court will recognize and give force and effect to resulting and constructive trusts in property held by the bankrupt, and even to obligations in the nature of a trust . . . Whatever obligations of this kind at-

tach to property coming to the hands of the bankruptcy trustee are good as against him and must be observed."

Remington on Bankruptcy, 1957 Rev. Vol. 3, Sec. 1417.

VII. THE BANKRUPT LESSEE WAS ESTOPPED TO ASSERT OWNERSHIP OR TITLE OR ANY INTEREST IN OR TO THE LIQUOR LICENSE AT THE TIME OF THE FILING OF THE BANKRUPTCY PETITION AGAINST IT, BY THE CIRCUMSTANCES UNDER WHICH THE LICENSE WAS TRANSFERRED TO IT BY APPELLEE, AND BY ITS WRITTEN AGREEMENT TO RETRANSFER SAME TO APPELLEE UPON THE TERMINATION OF ITS LEASE; AND ITS TRUSTEE IN BANKRUPTCY, APPELLANT, IS IN NO BETTER POSITION, AND LIKEWISE ESTOPPED.

Remington on Bankruptcy, 1957 Rev. Vol. 3, p. 341, Sec. 1415.

VIII. WHERE PROPERTY STANDING IN THE NAME OF A DEBTOR IS SUBJECT TO A TRUST, THE DEBTOR HAVING MERELY THE BARE LEGAL TITLE, THE CREDITORS OF THE TRUSTEE CANNOT SUBJECT THE PROPERTY TO THE PAYMENT OF THEIR CLAIMS. THE LIEN OF THEIR JUDGMENT DOES NOT ATTACH TO THE LEGAL TITLE, AS IT IS A LIEN ONLY ON THE INTEREST OF THE JUDGMENT DEBTOR. LATENT EQUITIES AGAINST THE DEBTOR, SUCH AS ARISE UPON A TRUST, MAY BE ASSERTED AGAINST THE TRUSTEE'S ATTACHMENT OR JUDGMENT CREDITOR, WHO AS TO SUCH EQUITIES, DOES NOT HAVE THE STATUS OF A BONA FIDE PURCHASER FOR VALUE. AND THE RIGHTS OF THE EQUITABLE OWNER ARE UNAFFECTED BY THE INSOLVENCY OF THE TRUSTEE.

25 *CalJur* 210, Sec. 77; *McGee v. Allen* (1936), 7 C2d 468, 473, 60 P2d 1026; *Murphy v. Clayton* (1896),

113 C 153, 157 to 162, inc., 45 P 267; *Nishi v. Downing* (1937), 21 CA2d 1, 3, 67 P2d 1057; *Riverdale Min. Co. v. Wicks,* 14 CA 526, 112 P 896.

"If it can be established that property which stands in the name of a debtor is subject to a trust, the debtor having merely the bare legal title, the creditors of the trustee cannot subject the property to payment of their claims . . .the rights of the equitable owner are unaffected by the insolvency of the trustee."

25 *CalJur* 210, Sec. 77.

"(EFFECT OF INSOLVENCY.) Although a trustee becomes insolvent or bankrupt, the beneficiary retains his interest in the subject matter of the trust if it can be identified, or in its product if it can be traced into a product, and is entitled thereto as against the general creditors of the trustee (see Sec. 202)."

Restatement—Trusts, Sec. 12, p. 42.

"KNOWLEDGE OF CREDITOR AS TO EQUITABLE OWNERSHIP. Nor is the trustee's creditor in the situation of one who has acquired title to the property from the trustee without knowledge or notice of the beneficiary's claim to equitable ownership. While a person who has dealt with another, relying upon the latter's possession and apparent ownership of property, is protected in some situations, a mere extension of credit, as contradistinguished from a payment of a valuable consideration, does not, apparently, give rise to a right which is superior to that of the equitable owner."

25 *CalJur* 213, Sec. 80, citing *Murphy v. Clayton,* 113 Cal 153, 159.

"RIGHTS OF TRANSFEREE AND EQUITABLE OWNER. If the property or money has passed from the trustee into the possession of a third person, the latter may be held liable at the suit of the equitable owner—provided that the defendant was not a taker for *value* and *without knowledge* of the trust . . ."

25 *CalJur* 214, Sec. 81.

"EFFECT OF KNOWLEDGE. On the other hand, a person who acquires property from another *with knowledge* that the transferror has merely the legal title, equitable ownership being in a third person, is deemed to hold the land, goods or securities charged with a trust in favor of the equitable owner . . ."

25 *CalJur* 222, Sec. 90.

"TIME OF ENJOYMENT. If a present beneficial ownership was created by a declaration of trust, or if title passed to trustees by a conveyance or transfer of the property, the validity of the trust is not affected by the circumstance that the beneficiary's enjoyment of the property is postponed until a future time. In short, future trust estates or interests are valid. . . . The estate or interest which precedes that of the beneficiary *remains in the trustor.*"

25 *CalJur* 316, Sec. 167.

IX. BEFORE CREDITORS OF THE RECORD TITLE HOLDER CAN SUBJECT THE PROPERTY OF THE INVOLUNTARY OR CONSTRUCTIVE TRUSTEE TO PAYMENT OF HIS DEBTS, THEY MUST SHOW THAT THE RIGHTFUL OWNER KNEW THAT THE RECORD OWNER WAS CLAIMING THE PROPERTY AS HIS OWN AND THAT A CREDITOR WAS INDUCED TO EXTEND CREDIT IN RELIANCE ON THAT CLAIM.

48 *CalJur* 2d 754, Sec. 113, citing *In re Rogal,* 112 F. Supp. 712.

Though a deceased trustee's apparent ownership of the trust property may have given him a fictitious credit, the general creditors of his estate have no equities superior to those of the beneficiaries. *Byrne v. McGrath,* 130 C 316, 62 P 559.

A bankrupt trustee may continue to discharge his duties as a trustee, and the trust property in his possession does not go to his assignee or to his creditors. 48 *CalJur* 2d 754, citing *Bank of Cottonwood v. Henriques,* 91 CA 88, 266 Pac 836. Moreover, where there are no innocent transferees, and the beneficial owner has not knowingly permitted the legal owner to obtain credit by representing himself to be the true owner, property held by a bankrupt as trustee of a resulting trust is not subject to sale as property of the bankrupt estate. 48 *CalJur* 2d 754, Sec. 113, citing *Williams v. Levy,* 54 F2d 18.

X. WHO ARE BONA FIDE PURCHASERS.

One who purchases trust property for value from the holder of the legal title *without notice* of the trust is protected against enforcement of the trust. 49 *Cal*

Jur 2d 326, Sec. 473. But, an attachment or judgment creditor is not a bona fide purchaser for value, as against the owner of the equitable title or the one entitled to the subject of the trust.

49 *CalJur* 2d 327, Sec. 473;

McGee v. Allen, 7 C2d 468, 60 P2d 1026.

Nor is the trustee's trustee in bankruptcy a bona fide purchaser for value; 49 *CalJur* 2d 327, Sec. 473; *In re Rogal,* 112 F. Supp. 712; as he comes into them merely by operation of law.

Remington on Bankruptcy, 1957 Rev., Vol. 4, p. 486, Sec. 1741.

XI. NO CREDITOR OF THE LESSEE-BANKRUPT COULD CLAIM HE WAS "WITHOUT NOTICE" OF THE BENEFICIAL INTEREST OF APPELLEE IN THE LICENSE, FOR THE REASON THAT APPELLEE RECORDED THE LEASE AGREEMENT IN THE COUNTY RECORDER'S OFFICE IN SANTA CRUZ COUNTY WHEREIN THE LEASED PROPERTY WAS SITUATE, SHOWING THE TRANSFER OF THE LICENSE TO LESSEE AND ITS AGREEMENT TO RETRANSFER SAME TO APPELLEE. THIS GAVE PUBLIC NOTICE TO ALL INTERESTED, OF THE INTEREST OF APPELLEE IN AND TO SAID LICENSE.

(TR 15.)

Sec. 19 *Civil Code;* Sec. 1213 *Civil Code* provides:

"Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees; . . ."

Constructive notice of trust deed is binding in same manner as actual notice. *Central Const. Co. v. Hartman* (1935), 7 CA2d 702, 47 P2d 484.

Notice or imputed knowledge is predicable of matters appearing in public records. 25 *CalJur* 224; 36 *CalJur* 2d 415-417, Sec. 5.

The Lease Agreement was so recorded on August 5, 1946 (TR 15, Sec. I) about nine years before the filing of the Petition in Bankruptcy against lessee, showing the transfer of the license *to* lessee, and the latter's agreement in Par. 26th thereof, to retransfer same to lessor upon termination of the lease, without any consideration.

XII. NO CREDITOR OF THE LESSEE COULD HAVE BECOME A BONA FIDE PURCHASER OF THE LICENSE FOR VALUE AND WITHOUT NOTICE OF THE WRITTEN AGREEMENT OF LESSEE TO RETRANSFER SAME TO APPELLEE, NOR COULD ANY CREDITOR OF LESSEE-BANKRUPT HAVE BECOME AN ATTACHMENT AND EXECUTION CREDITOR OF LESSEE BASED UPON AN ALLEGED EXTENSION OF CREDIT TO LESSEE ON THE ALLEGED GROUND THAT THE LICENSE STOOD IN THE NAME OF LESSEE. AND THE LESSEE'S TRUSTEE IN BANKRUPTCY DOES NOT TAKE TITLE AS A BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE OF EQUITIES. HE DOES NOT HAVE THAT STATUS. HENCE IF HE TAKES ANY TITLE AT ALL AS SUCH TRUSTEE IT IS SUBJECT TO THE OWNERSHIP OF THE LICENSE BY APPELLEE, AND IN ANY EVENT ANY RIGHTS OF THE TRUSTEE IN BANKRUPTCY IN OR TO THE LICENSE WOULD BE SUBORDINATE TO THOSE OF APPELLEE AND IT IS THE DUTY OF SAID TRUSTEE TO SURRENDER TO APPELLEE THE PROCEEDS OF THE SALE OF SAID LICENSE. NO RIGHT, TITLE OR INTEREST IN OR TO THE LICENSE WAS VESTED IN LESSEE'S TRUSTEE IN BANKRUPTCY.

XII. A. Answer to Appellant's Contentions Directed Toward This Point.

Appellant makes the following statements:

(AOB 6) "It is conceded that the bankrupt was, at the time of the filing of the petition in bankruptcy, the licensee."

The stipulation is that at that time, the license "*stood in the name* of Newcomb Interests, Inc. . . ."

(AOB 6) "*At the time of the filing of the petition in bankruptcy* any creditors inquiring of the State Board and selling liquor or other merchandise to the bankrupt *on credit* would be entitled to rely on this ownership of record. Appellee clearly permitted the bankrupt to exercise dominion over the license and to use the same in the operation of the bankrupt business."

We believe that at the time of filing of said Petition, no creditor would, or could extend credit to the lessee relying on any ownership of record of the license, for the lessee was ousted from the premises on September 30, 1954 (TR 17, Sec. IV), and said Petition was not filed until June 6, 1955. (TR 17, Sec. V.) We have a Stipulation as to what *facts* "shall be considered by the Court" in this matter (TR 15), and no such assumed fact of any creditor so "inquiring of the State Board" is in such Stipulation. It is appellant's mere speculation and conclusion.

Appellee did not permit lessee to "exercise dominion over the *license*". Lessee could not operate the bar leased with the premises, without a liquor license; nor could the lessor-appellee use his liquor license without the bar; the license being appurtenant to those premises.

Appellant cites (AOB 6), *Benedict v. Ratner* (1925), 268 U.S. 353, 69 L.Ed. 991, decided under the law of the state of New York. It was an action to set aside as a preference, an assignment of accounts receivable by the bankrupt, on the ground it was fraudulent as to creditors because, the bankrupt made the assignment as alleged security for a loan, but thereafter continued to collect and use for its own account, said collections; which the bankrupt was permitted to do under the terms of the loan and assignment. The assignment was declared fraudulent and void as to creditors, as to payments made to the bankrupt within four months preceding the bankruptcy. We are unable to see any application whatever of this case to the one

before this court. Certainly, after Appellee here transferred the license to Newcomb, *he* exercised no dominion whatever over it or over the business of lessee, except to collect his rent if possible, up to the time he foreclosed and retook possession of the hotel, and attempted to retrieve his liquor license.

Appellant cites *England v. Nyhan* (1944), (C.A. 9th), 141 F2d 311 (AOB 7), to what point, is not clear. Involved there was only the question, whether the referee erred in sustaining a plea to the summary jurisdiction to determine the interest of a claimant to rights in a taxi permit standing in the name of the bankrupt. The holding of the case is that "possession" of the property is sufficient to vest summary jurisdiction, and that since the bankrupt had possession of the permit standing in his name, the order of the referee sustaining the plea thereto, was in error. We are unable to se the application of this case to the instant one.

> Appellant states that appellant represents the "creditors of the licensee who did business with and extended credit to the licensee-bankrupt on the basis of his record ownership of the license." (AOB 8.)

Again we point out that there is no evidence whatever in the record to sustain this statement. It is entirely appellant's self-serving assumption and conclusion. Appellant has stipulated to the facts which may be considered on this appeal, and he is bound by them, as well as appellee is bound.

Appellant states:

> "It was held in the Matter of Norman A. Murphy . . . that 'such' creditors had no *duty* to look further than to the face of the license to determine whether or not the person with whom they were doing business was, in fact, the licensee." (AOB 8.)

And appellant cites this case as "Case No. 38370, U. S. District Court, Northern District of California." We therefore had to make a trip to court to go over the file therein, and although same has been gone over very carefully, we do not find therein any opinion or decision whatever. We did find, however, such language in a brief of counsel for the bankruptcy trustee. But if there is such a decision, creditors have no "duty" to look at any license, and there is nothing in this record to establish that any creditor ever did look at the license involved in this case.

Appellant cites Sections 23009 and 23300, *B & P Code,* the first defining a "licensee" as any person holding a license issued by the board; and the second, providing that no person shall exercise the privilege which a licensee may exercise unless such person is authorized to do so by a license duly issued. (AOB 9.) And he then cites Section 24070, *B & P Code,* to the effect that a license is transferable from the licensee to another person upon the approval of the Board, now Department of Alcoholic Beverage Control; and the payment of a transfer fee; and states:

> "It is clear that at no time prior to the filing of the Petition in Bankruptcy herein had appellee

obtained the approval of the Alcoholic Beverage Control Board to a transfer to him of the license in question, nor had he paid the transfer fee. Therefore, he could not be considered as the owner of the license." (AOB 9.)

FIRST: It is provided in the Stipulation to Facts (TR 17, Sec. III):

> "That on the said 25th day of July, 1946 . . . there *was no regulation* of the Board of Equalization of the State of California *preventing the legal execution and enforcement* of the provisions of paragraph Twenty-sixth of said lease hereinbefore set out; . . ."

SECOND: The same contention was made in *Campbell v. Bauer,* supra, 104 CA2d 740, 744, and the court held that the decree of specific performance of the retransfer agreement would be affirmed even though the application to the Board for the retransfer had not been made and the retransfer and issuance of the new license was subject to the approval of the Board, as it was nevertheless the duty of the holder of the license to make the application and that equity would regard it as having been done.

THIRD: The license *has already been transferred and sold* at public sale to a third party for $6,000.00 (TR 20) and this controversy is over the *proceeds* of such sale. As shown, it was stipulated between the parties through their counsel that the license might be sold by the Trustee in Bankruptcy and that the proceeds thereof should be impounded by the Trustee and all claims of appellee be transferred to the pro-

ceeds of said sale without prejudice to any of the rights of appellee in said liquor license. (TR 14.) It is too late for the Trustee now to contend that the *appellee* has not "obtained the approval of the Board to a transfer to him of the license . . . and has not paid the transfer fee" and *hence,* that appellee "could not be considered as the owner of the license." (AOB 9.)

> "A trustee in bankruptcy is not in the position of a bona fide purchaser of the property and assets of the bankrupt, since he comes into them merely by operation of law. . . .
>
> It is well settled that even the 'strong arm' clause in Sec. 70(c) of the Act confers only status as a creditor with lien obtained by legal or equitable proceedings, at the time of filing of the petition initiating proceedings under the Act. Such status frequently permits the trustee to upset transactions of the bankrupt which have not been, at time of filing of the petition, perfected as against the bankrupt's creditors by proper recording or the like, and thus to assert such superior rights as a bona fide purchaser might also have been able to assert; but that is purely coincidental. The fact that a bona fide purchaser could hold the bankrupt's prior transaction for naught is no test whatsoever of the trustee's right or power to do so."
>
> *Remington on Bankruptcy,* 1957 Rev. Vol. 4, Sec. 1741.

There is no evidence whatever in the record that any creditor of the lessee-bankrupt *knew* that the license was in the name of Newcomb Interests, Inc., or that any creditor of said lessee ever extended any

credit to lessee allegedly based upon that ground; or that lessor-appellee ever knew or believed that any creditor was extending credit to lessee-bankrupt on that ground; but *on the contrary there is evidence* that appellee *gave public notice* to anyone who might be interested in the ownership of the license, of lessee's limited tenure thereof, and of lessor's beneficial ownership thereof, by recording the Lease in the County Recorder's Office of Santa Cruz County wherein the Casa Del Rey Hotel with bar, leased by appellee was situated, on August 5, 1946. (TR 15, Par. I.)

XII. B. The Bankrupt Could Not, (1) at Any Time Prior to the Filing of the Petition, by Any Means, Have Transferred the License (to Anyone But Appellee); and Did Not; Nor, at Said Time, (2) Could the License Have Been Levied Upon and Sold Under Judicial Process Against the Bankrupt, or Have Been Otherwise Seized or Impounded or Sequestered by Any Creditor or the Bankrupt; and Was Not; Nor, at the Date of Bankruptcy, (3) Could Any Creditor of the Bankrupt, Have Obtained a Lien Thereon by Legal or Equitable Proceedings.

This has reference to Section 70(a)(5) and Section 70(c) of the Bankruptcy Act, 11 U.S.C.A. 110(a)(5) and 110(c), quoted by Appellant (AOB 10), pointing out that the District Judge in his decision appealed from, *Huffman, as Trustee v. Farros,* 171 F. Supp. 704, held that: "property held under a trust cannot be reached by the trustee's creditors . . . The license, then, would be exempt from the claims of any creditors." (TR 40.)

It is the argument of appellant (AOB 11) that because it is held in *Golden v. State of California*

(1955), 133 CA2d 640, 645, 285 P2d 49, 53, that a liquor license was subject to a lien for U. S. Internal Revenue Taxes (there being no involuntary or constructive trust involved therein); and cites *In re Quaker Room,* supra, 90 F. Supp. 758, 760, holding that a liquor license is "property"; and that *Golden v. State* cites *U. S. v. Blackett* (1955), (CCA 9th) 220 F2d 21, 23, holding that even though a sale of a state liquor license was precipitated by a judgment creditor of licensee, that the proceeds of the sale were subject to the theretofore perfected Internal Revenue tax lien of the U. S. (there being no involuntary or constructive trust involved therein); that these authorities establish that the appellant Trustee herein was given a lien in this instant case by the foregoing Sec. 70(a)(5) and 70(c) of the Bankruptcy Act; and hence that the District Court erred in holding that: "creditors and thus Appellant Trustee could not obtain a lien on the liquor license." (AOB 12.) The conclusion does not follow and is without support. It will be noted that Appellant Trustee *does not question* the holding of the U. S. District Court that:

> ". . . the corporation's (lessee's) retention of the license after the termination of the lease was wrongful. On property so retained the law of California imposes an involuntary or constructive trust . . . And it is settled that property held under a trust cannot be reached by the trustee's creditors."

And no such objection is the subject of Appellant's Specification of Errors. (AOB 2.) On the contrary, Specification (b) reads:

> "The holding of the District Judge that the property *held under trust* cannot here be reached by the Trustee's creditors since the beneficiary did nothing to induce the Trustee's creditors to rely on the apparent worth of that title, is erroneous and contrary to law."

Appellant does not expressly admit the trust, but it would seem that appellee is entitled to conclude from the foregoing that at least appellant does not question the trust finding and holding, of the District Court.

Appellant *does not claim* that, in the face of the failure or refusal of the lessee to retransfer the license as agreed, upon termination of its lease, and the consequent imposition of an involuntary trust upon the lessee, and the license; that the lessee-bankrupt could nevertheless have, prior to the filing of the petition, transferred the license to anyone but appellee; nor that in the face of lessee's violation of his written agreement to retransfer, and the imposition thereupon of an involuntary trust, that any *creditor* of the bankrupt *lessee* could nevertheless have levied upon the license, and sold it under judicial process against the lessee; nor that at the date of bankruptcy any *creditor* of the *bankrupt,* in the face of the establishment of such involuntary trust, could have obtained a *lien* on the license *by legal* or *equitable proceedings,* which could be deemed vested in the Trustee as of such date. Hence it is contended by appellee that appellant has not established that said Sec. 70(a)(5) and/or Sec. 70(c) of the Bankruptcy Act, have any application to this instant case.

"If the trustee of an express trust becomes bankrupt, the property which he holds in trust does not vest in his trustee in bankruptcy. It is simply not 'his' property, but property which he has possession of for a special purpose and in a fiduciary capacity. . . .

The trustee in bankruptcy must recognize any rights against the property which comes to his possession which the bankrupt or debtor would have had to recognize."

Remington on Bankruptcy, 1957 Rev. Vol. 3, p. 48, Sec. 1212.

"It is the well settled general rule that a trustee in bankruptcy takes title, under Sec. 70 (a) of the Bankruptcy Act, subject to all equities and defenses existing against the bankrupt at the time of filing of the petition instituting proceedings under the Act, and comes into no less, but no better, right or title than the bankrupt then had. It is true that under other provisions of the Act the trustee has the rights of an attaching, execution, or judgment creditor, that certain liens obtained by legal or equitable proceedings are void as against him, and that he can avoid fraudulent transfers and preferences as shown in subsequent chapters of this treatise; but these are exceptions to the rule, based on special provisions and *inapplicable* except as they fall within the scope of such provisions. . . .

The general rule stated above does not appear in so many words anywhere in the statute, but it is clearly inferable from the fact that under Sec. 70 (a) of the Act the trustee takes only 'the title of the bankrupt' and comes into that title

only by 'operation of law'. He is therefore not a bona fide purchaser, but merely a successor in title. (Authorities.)"

Remington on Bankruptcy, 1957 Rev. Vol. 3, Sec. 1412.

A bankruptcy trustee takes bankrupt's property in same condition that bankrupt held it and subject to all valid legal or equitable liens not expressly rendered void by terms of section 1 et seq. of the Bankruptcy Act, in absence of fraud. *Cohen v. Wasserman* (C.C. Mass. 1956), 238 F2d 683.

It is further said in *Remington,* 1957 Rev. Vol. 5A, Sec. 2503:

"The right to reclaim property which was held in trust by the bankrupt for the reclaimant, and to which the bankrupt had no individual claim, is beyond question, as shown in the next succeeding section hereof. The reclaimant can recover the property itself, if still in possession of the bankrupt or of the bankruptcy court, or its avails or other property into which the avails have been transmuted if he can trace the avails and identify the property and it is in the bankruptcy court's possession."

". . . the right to trace and reclaim them . . . is founded deep in the law of trusts and equity jurisprudence."

Remington, 1957 Rev. Vol. 5A, Sec. 2504, p. 332.

"Notwithstanding his official status, the trustee in bankruptcy is in no stronger position than the bankrupt himself would have been to resist an

application to reclaim trust funds or property held in trust for the reclaimant."

Remington, 1953 Rev. Vol. 5A, Sec. 2504, p. 335.

XII. C. A Bankruptcy Court Is a Court of Equity Dealing Primarily in the Equities of the Situation.

Remington on Bankruptcy, 1957 Rev. Vol. 3, page 346, Sec. 1417.

The following are pertinent authorities cited in Title 11 U.S.C.A. under the aforesaid Section 70(a)(5) and 70(c) of Bankruptcy Act (110 U.S.C.A. (a)(5) and 110(c)): The purpose of 70(c) was to vest in the bankruptcy trustee, such title as a bankrupt has under the law of the state where situated. *In re Richards & Holloway* (D.C. La. 1940), 35 F.Supp. 51. This section vests the trustee by operation of law, with such title as the bankrupt had, and in the absence of fraud, the trustee takes no better title, and with respect to the character of his title, the trustee occupies the same relation to creditors that the bankrupt sustained prior to the proceedings. *In re L. H. Duncan & Sons* (1942) (CA Pa.), 127 F2d 640. A trustee stands in the shoes of the bankrupt, except as against fraudulent conveyances and similar transactions, and can assert no greater right against one by whom premises were leased than could have been asserted by the bankrupt in absence of bankruptcy proceedings. *Schultz v. England* (C.A. 9th 1939), 106 F2d 764. A trustee in bankruptcy takes the property of the bankrupt subject not only to specific liens, but also to equities in favor of third persons, which are

not invalid as to creditors. *In re Sherwoods* (1913 CCA NY), 210 Fed. 754. If bankrupt holds property in trust for another, trustee in bankruptcy takes title to such property *charged with trust* and so long as property can be identified, it will be treated in bankruptcy as property to which creditors of the bankrupt *have no claim,* and will be paid over as a whole, before disbursements are made to lienholders or unsecured creditors. *City of Dallas v. Crippen,* (CA Tex. 1948), 171 F2d 526, cert. den. and rehg. den., 336 U.S. 937 and 955. A bankruptcy trustee takes title to all property to which the bankrupt has title, though it be held in trust, but when it appears that the bankrupt is only a trustee and has no beneficial interest in or claim against the property, the Court should turn it over to its true owners where possible. *Todd v. Pettit* (C.A. Tex. 1939), 108 F2d 139.

The trustee in bankruptcy is not entitled to property in possession of the bankrupt which is held under an implied trust or to which a constructive trust attaches. *In re Franklin Savings & Loan Co.* (D.C. Tenn. 1940), 34 F. Supp. 661. Property held by a bankrupt by a mere naked legal title, and purely in trust for another, is no part of his estate in bankruptcy and does not pass to his trustee. *Lowell v. International Trust Co.* (Mass. 1907), 158 F. 781, 86 C.C.A. 137.

As to such property as was held by the bankrupt, at the time of his adjudication, in trust for another, it comes into the hands of his trustee in bankruptcy impressed with the rightful claims of the beneficiary

thereof, whose interests will be fully protected upon proper proof. *In re Davis* (D.C. Mass. 1901), 112 F. 129.

XII. D. Appellee's Answer to Appellant's Contentions That He May Deprive Appellee of His Right, Title and Beneficial Interest in and to Said License.

Breeze v. Brooks (1892), 97 Cal 72, was an action by the *creditors of John Brooks* to set aside his deed of certain land standing in his name, to his brother Patrick Brooks and to subject the land thus transferred to Patrick Brooks to their claims as creditors of John; on the ground that John's said deed to Patrick was fraudulent and made with intent to defraud them as John's creditors. The basic facts were substantially the same as those established in a former appeal, *Breeze v. Brooks,* 71 Cal 169, though somewhat stronger as against the creditors; and the following is with reference to the first decision: Patrick had paid all the consideration for the land in question and caused it to be placed in the name of John. The court held (71 C 181):

> "That John had nothing except a naked legal title, and therefore *held same in trust* for Patrick. John thereafter deeded the land to Patrick, thereby conveying to the latter only that which belonged to him. (This was the deed sought to be set aside.) The court points out (71 C 181) that John was Patrick's tenant and never so far as Patrick knew, had asserted any title adverse to Patrick's; that it appeared that the creditors in giving credit to John had not relied on any statement of Patrick that John owned the land; nor is

it there intimated that they examined the *records of deeds* . . . to find out what they disclosed in reference to John's title, or relied on them in any way to induce the credit which they extended to John. They seem to have relied on the facts that John lived on the land, claimed it in his conversations with them, and that he was insolvent and Patrick knew it . . ."

(71 Cal 181):

"Therefore it does not appear that the deed from John to Patrick was made to hinder, delay, or defraud creditors; it was simply made to reinvest Patrick with the legal title to his own land. So that after this conveyance was made in good faith, John had no interest in the land, and if it was sold at sheriff's sale under execution, the *purchaser got no title,* as a purchaser at such sale can get no title save that of the judgment debtor . . ."

(71 Cal 182):

"So far as the findings disclose, Patrick did not act to induce creditors of John to believe the land was John's save that he allowed the title upon the record to stand in John's name, which record these creditors never examined . . .

It does not appear that Patrick had any knowledge that John was getting credit from anyone upon the faith of his apparent ownership of the land . . . in such a case we understand the authorities all to agree that one cannot be estopped to set up that which, but for such act, would be a good legal title to land."

On the second appeal, 97 Cal 72, 75, the court referring to the former appeal, says:

> "It was then held necessary that the plaintiffs (creditors), in order to entitle them to a recovery, should show that Patrick was in some way privy to John's obtaining credit from them, or that in giving such credit they relied upon some affirmative statement or act of Patrick, other than his permitting the title to stand of record in John's name; and the mere fact that Patrick allowed the title to the land to stand of record in the name of John was unavailing to plaintiffs, unless they could establish . . . that they relied thereon as an inducement to give credit to John."

The court affirmed the judgment in favor of the defendants.

Murphy v. Clayton (1896), 113 Cal. 153, was an action to establish a resulting trust in land, which was conveyed into the name of D. J. Murphy alone, though one-half of the consideration of the purchase was paid by his mother, Ann, the plaintiff. Upon the death of D. J. Murphy, his administrator, defendant Clayton, took possession of said land, and claimed it, as an asset of the former's estate. The court holds (113 Cal. 157):

> "The consideration for the land having, at the time of the purchase, been paid, half of it by appellant's intestate and half of it by the respondent, and the title taken by the former, a resulting trust arose in the land in favor of respondent for the undivided one-half thereof . . .
>
> It is insisted by the appellant (Clayton) that he, as the representative of the creditors of the

deceased debtor, can assert the priority and superiority of their claims over the secret equity of the plaintiff . . . (113 C 158)

A resulting trust, being a purely equitable interest, is cut off and destroyed as against all *bona fide* purchasers or mortgagees from the trustee for a valuable consideration and without notice. (Auths.) (p. 159). . . . But it will be observed that in all these cases, as well as in the sections of the Code of Civil Procedure applicable to the estates of deceased persons, the possession and lien mentioned relate to the estate of *the decedent* (court's italics), and *not* to *that which he held in trust for others*. . . .

Neither the appellant nor any creditor of the decedent stands in the relation of purchaser or mortgagee of the property. Counsel for appellant does not mention any case which extends the doctrine of the cited cases or applies section 1107 of the Civil Code to mere creditors who have not advanced money on mortgage, or purchased at a sale . . .

Does the finding that the conveyance was made to D. J. Murphy, and that from the date thereof to the time of his death he was in the apparent sole possession and ownership, managing and dealing with the property as his own, with respondent's knowledge and consent, coupled with the finding that his credit was based, in part, upon the fact that the property stood in his name, and his indebtedness was contracted without notice to his creditors of respondent's equity, estop the respondent, and cut off that equity?

I do not think the facts found tend to establish such estoppel. They show no act, conduct, or ad-

mission upon the part of respondent by which the creditors were induced to give credit to the decedent. (p. 160) They do not show even that any of the creditors knew that the title to the property stood in his name, or that means were taken by any of them to ascertain the true state of the title."

In *Lux v. Haggin*, 69 Cal 266, the court said:

"To constitute the estoppel the party claiming the benefit of it must be destitute of knowledge of his own legal rights, and of the means of acquiring such knowledge. (Auths.)

To constitute such an estoppel it must also be shown that the person sought to be estopped has made an admission or done an act, *with the intention* (court's italics) of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give, or the title he proposes to set up; that the other party has acted upon or been influenced by such act or declaration; that the party so influenced will be prejudiced by allowing the truth of the admission to be disproved. (Auths.) . . . Equity does not favor estoppels."

The court then refers with approval to the cases of *Breeze v. Brooks,* 71 Cal 167 and 97 Cal 72, and quotes to some extent from the first case, and concludes (p. 162):

"There is nothing illegal or against public policy in the mere fact that a party equitably entitled to real property permits the legal title to remain in another; resulting trusts are fully recognized

by our law; and every one is presumed to know the law. (Auths.)"

The court affirms the judgment.

Bank of Cottonwood v. Henriques (1928), 91 CA 88, involved fact situations substantially similar from the legal viewpoint, to those of the foregoing cases of *Breeze v. Brooks,* and *Murphy v. Clayton,* and the court cites those cases as controlling, and holds to the same effect in all respects.

In re Rogal (1953), 112 F. Supp. 712 (USDC-S.D. Cal. Central Division), was on a petition for review of the Bankruptcy Referee's order, denying a Petition of the father of the bankrupts, to impress a trust on California business and residential realty, to which bankrupts had naked legal title. The court holds (716):

(2-4)

"As we are dealing with real property situated in California, rights of the parties to it must be determined, not according to general principles, but by the rules laid down by California courts in determining such rights. (The court cites and quotes sections 853 and 2224 of the California Civil Code, and referring thereto says, p. 717):

(5)

California courts in giving effect to these sections, have, for a period of over three-quarters of a century, held that a person may place the legal title in another in trust for himself, and that the legal owners will be compelled by the courts to restore title to the property, if they

repudiate the trust. These principles have been applied with great uniformity to dealings between persons standing in fiduciary relationships, such as (here the court refers to quite a few California cases dealing with such trusts).

The only deviation from the principle established by these cases arises in the case of a *bona fide* purchaser for value without notice. As to him the California Civil Code specifically provides as to both resulting and express trusts (Quoting sections 856 and 869):

(6)

California courts have held that an attachment or judgment creditor is not a *bona fide* purchaser for value. (Auths.) Both Collier and Remington state emphatically that the trustee does not take title as a *bona fide* purchaser for value without notice of equities. (Citing thereto.)"

The Court of Appeals for the Fifth Circuit has summed up the rule and the reason for it in a brief opinion which reads:

"The court disallowed a claim of the appellant that it was entitled to an equitable lien on land of the bankrupt which was intended to be included in a deed of trust . . . but by mutual mistake of the parties . . . was omitted. Under the recording laws of Texas the equitable title of the appellant to the omitted land was not required to be recorded in order to protect it against creditors of the bankrupt in whose favor an attachment or an execution on a judgment against the bankrupt was issued. (Auth.) Under amended section 47a of the Bankruptcy Act (11 USCA Sec. 75),

> the trustee in bankruptcy has the status of such a creditor, *not the status of a bona fide purchaser for value and without notice.* (Court's italics) (Auths.) The rights of the trustee in bankruptcy being subordinate to those of the appellant, based on the asserted equitable claim, which was supported by the evidence, the disallowance of that claim was erroneous." (Cit.)

(The court then quotes with approval from the foregoing case of *Breeze v. Brooks* (1892), 97 Cal. 72, 76-77, as partly quoted in this brief in this instant case. The court follows the cases referred to in the decision including *Breeze v. Brooks.*)

The court also cites *Williams v. Levy* (1931), (CA 9th), 54 F2d 18, where a very similar fact situation to that in *In re Rogal,* and in the instant case was involved, and wherein the court says:

> "The case as made by the facts is one where the bankrupt, prior to bankruptcy, took the naked legal title to property, the whole ownership of which was in appellee, with the duty upon demand of appellee to transfer the same to him. It would be strange indeed if in such a situation, where bankruptcy has intervened, the trustee of the title holder's estate could, by securing an order of a referee to that effect, wipe out all of the property rights of the owner in the land. There is not a finding, as made by the referee, which can justify the order which was reviewed by the district judge. No situation was presented or claimed as that where the purchaser of property has had title taken in the name of another person, *and has knowingly allowed such person to obtain*

credit upon the representation that he was the true owner thereof. (Court's italics.) Neither are the rights of any innocent transferees involved. The case is so plain as that a mere statement of the undisputed facts answers every argument of the trustee."

It is contended by appellee herein that this *Williams v. Levy* case, is quite applicable to the instant case before this court.

CONCLUSION.

By reason of the premises, it is contended that the Order of the District Court of April 2, 1959, reversing and setting aside the Order of the Referee granting the Petition of the Trustee-Appellant to Sell the Liquor License Free and Clear of any right, title, interest or claim of Appellee, in or to same, should be affirmed.

Dated, San Francisco, California,
September 30, 1959.

Respectfully submitted,
A. Don Duncan,
Attorney for Appellee.